

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

PAUL RAYMOND GRAFF,
Petitioner.

No. 2 CA-CR 2016-0227-PR
Filed July 19, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Maricopa County
No. CR1993006528001
The Honorable J. Justin McGuire, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Amanda M. Parker, Deputy County Attorney, Phoenix
Counsel for Respondent

Donau & Bolt, Tucson
By Alfred S. Donau III
Counsel for Petitioner

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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Howard and Judge Kelly¹ concurred.

ESPINOSA, Judge:

¶1 Petitioner Paul Graff seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Graff has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, in 1994, Graff was convicted of sexual assault and two counts of attempted child molestation, a dangerous crime against children.² The trial court imposed consecutive seven-year terms of imprisonment on the sexual assault conviction and one of the attempted molestation counts and suspended the imposition of sentence on the other, placing Graff on a lifetime term of probation.

¶3 In 1998, Graff filed a notice of post-conviction relief, which the trial court dismissed as untimely.³ The following year, he

¹The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

²Graff pled guilty to one count of attempted child molestation and no contest to the other.

³Graff also filed a notice of appeal, which was likewise dismissed as untimely.

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filed another notice, which was again dismissed as untimely. Graff apparently completed his prison terms in 2005.

¶4 In 2007, Graff violated the conditions of his probation, but the trial court continued his probation on the condition he serve two months in the county jail. In 2013, Graff admitted having violated a condition of his probation, and the court revoked probation, sentencing Graff to a presumptive, ten-year term of imprisonment.

¶5 Graff thereafter sought post-conviction relief, arguing 1) newly discovered evidence would have changed the sentence the trial court imposed and 2) his due process rights had been violated by the court's considering at sentencing his failure to fully inform his wife of the nature of his convictions and his having contact with her children. The trial court summarily denied relief.

¶6 On review, Graff again asserts his due process rights were violated and newly discovered evidence entitled him to relief. He contends the trial court abused its discretion in rejecting his due process claim alleging that, contrary to the court's conclusion that he had received adequate notice through, inter alia, the presentence report, some of the allegations "were not disclosed until the supplemental report, which the defense received too late to effectively refute."

¶7 Graff's situation, however, is different from that in *State v. Zajac*, 26 Ariz. App. 593, 550 P.2d 639 (1976), on which he relies for his premise that reversal is required when "a defendant is not given adequate notice of the reasons for revoking probation." *Zajac* did not admit having violated any terms of probation and he did not receive any notice of the grounds for his revocation. *Id.* On the record before us, however, the petition to revoke Graff's probation, filed September 6, 2013, included an allegation that he had "admitted to having minor contact from 2007 until present." The probation violation report likewise indicated Graff had admitted to contact with minors, specifically his wife's children. The supplement to that report, submitted five days before the October disposition hearing, provided more detail as to the contact. In it,

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Graff's probation officer explained that Graff's wife had contacted him and told him "she had never read [Graff's] conditions of probation and did not [k]now the offense [for which he] was on probation."

¶8 In revoking Graff's probation and imposing sentence, the trial court told Graff it found his account of the situation "implausible," and gave as examples of his dishonesty his wife's account of her knowledge of his crimes and his contact with her children. The court concluded by saying,

All I know is that you're not being honest with me about the level of contact you're having with kids. Any contact at all . . . is terrifying when you know what you[r] underlying crimes are and it's clearly a serious violation of your probation. It's not some gray area that you don't know about.

The court determined it was not appropriate to reinstate Graff to probation. It then found that the aggravating and mitigating circumstances "balance out" and imposed the presumptive sentence.

¶9 Thus, as the trial court concluded in denying the petition for post-conviction relief, Graff had notice of the grounds for his revocation—his admitted failure to comply with drug testing and his contact with children. And, as Graff was warned when he admitted the violation, by admitting "to violating one of the terms of the probation[, he] could go to prison." Although Graff contends he did not understand the importance of the allegations in time to respond appropriately, at the September 30 violation hearing, the court informed him it was not convinced re-instatement was the correct disposition and it continued the disposition hearing for two weeks. Graff's attorney did not ask for more time and stated he would contact Graff's wife. We cannot say the court abused its discretion in denying relief on Graff's due process claim.⁴

⁴To the extent Graff argues on review that his wife's statement to the probation officer should not have been considered because it

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¶10 We likewise reject Graff's claim that statements about his wife's knowledge of his charges and his contact with her children, made to an investigator by Graff's wife's former spouse and probation officers involved with Graff's case, were newly discovered evidence. To establish a colorable claim of newly discovered evidence pursuant to Rule 32.1(e):

- (1) the evidence must appear on its face to have existed at the time of trial but be discovered after trial;
- (2) the motion must allege facts from which the court could conclude the defendant was diligent in discovering the facts and bringing them to the court's attention;
- (3) the evidence must not simply be cumulative or impeaching;
- (4) the evidence must be relevant to the case;
- (5) the evidence must be such that it would likely have altered the verdict, finding, or sentence if known at the time of trial.

State v. Bilke, 162 Ariz. 51, 52-53, 781 P.2d 28, 29-30 (1989); *see also* Ariz. R. Crim. P. 32.1(e).

¶11 In this case, as the trial court correctly determined, Graff "could have obtained and introduced this information at either the original disposition setting or the continued disposition setting." He

was hearsay, Graff did not object at sentencing, nor did he raise such a claim in his petition for post-conviction relief. We therefore do not consider it. *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall contain "[t]he issues which were decided by the trial court and which the defendant wishes to present" for review); Ariz. R. Crim. P. 32.2(a)(3) (relief precluded on any ground waived at trial).

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has not established diligence in discovering the facts now presented. Nor has he shown the evidence likely would have changed the sentence. The court indicated the evidence presented “confirm[ed]” Graff had contact with minors and otherwise supported the basis for its original decision. We cannot say the court abused its discretion in denying relief on the ground of newly discovered evidence.

¶12 For these reasons, although we grant the petition for review, we deny relief.